CA20N
IP
N28

3 1761 12062256 8

Government Publications

NEWSLETTER

Information and Privacy Commissioner / Ontario

Vol. 2 Issue 4 Fall 1989

LIBRARY OCT 17 1989 University of Toronto

Commissioner's Message

Director of Compliance, Ann Cavoukian and I recently attended the 11th International Conference of Data Protection Commissioners in Berlin. Fellow Canadians in attendance included federal Privacy Commissioner John Grace, Commissioner Jacques O'Bready and André Ouimet of Quebec's Access to Information Commission, and other representatives from the federal and Quebec governments.

More than 100 participants from Europe, Scandinavia, Canada, Great Britain, and Australia met for the three day conference, whose theme was "Data Flows Without Borders -- New Data Protection Concerns."

In attendance for the first time were delegates from Japan and Hungary. Protection of privacy is an emerging issue in Japan, and that government is planning to introduce legislation in the near future.

In Hungary, as the Hungarian delegate indicated to the conference, freedom of information and protection of privacy is seen as an important development as the country builds towards democracy.

The issue of transborder data protection is critical for privacy commissioners in European countries, whose responsibilities normally include jurisdiction over the private sector.

A highlight of the conference was the formal adoption of a resolution on Transborder Data Protection Standards. Guidelines and recommendations on data protection have been adopted by the Council of Europe, the United Nations and other international organizations. The resolution recommended that data protection be given the same priority as the promotion of data processing and telecommunications in the development and use of international data services.

The resolution also called for governments to individually, and through international bodies, move towards establishing equivalent legal safeguards as soon as possible; transborder data transmission should be checked and monitored to ensure the protection of individual privacy.

In today's international environment, data networks are increasingly used for transfers of personal information -- for credit cards, travel bookings and within multinational enterprises. While the use of this new technology can bring significant benefit, at the same time it becomes increasingly difficult to safeguard the privacy of individuals whose personal details are being transmitted around the world.

Canadian Privacy Commissioner John Grace's presentation to the conference discussed highlights of the Guidelines Concerning Computerized Personal Data Files, recently released by the United Nations. The General Assembly is expected to ratify these guidelines sometime this fall.

The principles are essentially the same as those developed by the OECD and the Council of Europe, although Mr. Grace indicated that the new UN guidelines only offer the minimum protection. No attempt has been made to define privacy, rather, general principles of privacy protection are dealt with.

Another feature of the new guidelines is that they apply to both manual and automated data, and to both the private and public sectors. Penalties are referred to within the text, as is the recommendation that the guidelines be implemented by national or federal levels of government.

During his excellent presentation, Mr. Grace made specific reference to two areas where he felt there was room for improvement: He felt that the broad categories under "Power to make exception" were too wide; and that the guidelines should make reference to the question of data destruction, which is currently absent.

However, he suggested that in spite of these shortcomings, the guidelines should be supported by those at the conference.

Ann and I were both encouraged to find that the facsimile guidelines recently released by our agency were very well received by the conference delegates. Several countries are in the process of addressing similar questions relating to the security of facsimile transmissions, and they appeared to be pleased by our timely consideration of these issues.

The Federal Agency which is located in Bonn and the Berlin Data Protection Commissioner's offices were both responsible for the organization of the conference, and they were very gracious hosts to us all.

EDUCATION AND FOI

The '80s have seen the emergence of numerous freedom of information and privacy statutes around the world as a result of persistent lobbying by special interest groups in the '70s. Open government and the people's right to know emerged as buzz words from the decade mostly due to the scandals surrounding Watergate in the United States. The resulting uproar created a climate for lobbyists in other countries to demand a law similar to the one the Americans had enacted in 1966.

Freedom of Information came to be recognized as a basic right, as fundamental to our democratic way of life as the other freedoms: speech, religion, the press and the right of assembly. Many Americans consider it to be an unwritten part of the Constitution.

The access and privacy laws eventually passed were due to the fervour and concentrated energy of a multitude of groups and individuals. Though there were no specific lobby groups at the time of the passage of the Ontario *Freedom of Information and Protection of Privacy Act*, it came about because of the earlier climate created by lobby groups, the long standing interest in the province and the result of exhaustive studies (especially the Williams Commission Report in 1979, which came to be used as a source book on access to government information and privacy by government in other jurisdictions).

However, a curious thing happened once the various pieces of legislation were passed. Those who were the prime movers in demanding openness laws proceeded to move onto other issues and failed to actually use the legislation. Once the laws were in place it appeared that many thought there were no further duties to be performed as the battle itself had been won.

In fact, it had just started. What has come to be recognized by access advocates is the importance of using the statute. A right is only as sacrosanct as it is exercised by the people who have that right. Freedom of speech and freedom of religion will continue to be valued as long as they are exercised and governments allow individuals to exercise those rights. This point is germane to any freedom of information statute for the simple reason that such a law was designed to give people a basic right to know what their government is doing and why.

It becomes important for people to know that such a law exists, so that they have the opportunity to dig into the dusty corners of government for information relevant to the conduct of their lives and to get a sense of what government is thinking on issues. This now gives the citizen an edge in his dealings with government and makes it clear that government is not omnipotent.

It becomes even more essential for individuals to know they have access to their own personal file and a right to exercise some control over what is in that file and to make corrections if needed. This gives the individual some element of control over his relations with his government and serves to dispel the concept of "them and us."

This is why education about the existence of access statutes is so crucial to the whole freedom of information and privacy process. The United States failed to make any provisions for education of the public leaving the job up to public interest groups. Legislators in other countries neglected to make any such provisions, including the drafters of Canada's Access to Information and Privacy Acts. A Federal Parliamentary All Party Committee recommended that special measures be taken to educate people about their rights under these laws. Both federal Information Commissioner Inger Hansen and Privacy Commissioner John Grace have taken steps to educate people about their new rights but on the whole the federal government has been criticized for not conducting any sort of coordinated campaign leaving it up to the Commissioners. Quebec's Access to Information Commission has taken similar limited measures, and plans to expand their communications program to let Quebecers know about the legislation and encourage them to exercise their rights.

In this sense, Canada has been much more progressive than other jurisdictions. In countries where measures have not been introduced to inform people of these rights and no one is undertaking the function, the legislation has come under attack and, in some instances, has weakened.

In the final stages of passage of the Ontario Act, an amendment was added requiring the Information and Privacy Commissioner to educate the people of the province about the law. This was a pivotal addition as it recognized that without the knowledge that the citizen had a new right it could not be exercised. As access laws were intended for use by all the people and not just a select few, the educational role becomes an important function.

The federal government is now making plans to run a national awareness program about Canadians' rights under their Access and Privacy Acts. These plans have been in the developmental stage for a long time and have yet to be implemented. Plans are afoot in Ontario to inform the people in the province about the new law and what it means to them.

It is imperative that these steps be taken in all jurisdictions. We are now awash in information technology which is coming to dominate our lives. Never has the issue of privacy been more important.

Beyond this, and on a more fundamental level vital for the health of democracy, for the concept of open government to continue to be viable it is important that the people know that they have a right to know.

by Tom Riley

Tom Riley, President of Riley Information Services, has specialized in freedom of information and privacy issues for 15 years. His address: P.O. Box 261, Station F., Toronto, Ontario M4Y 2L5. Phone: (416) 593-7352.

IMPLICATIONS OF ORDER NO. 81

The Commissioner's recent decision, Order 81, should be read with interest by anyone involved with Ontario's access scheme. This decision identifies some key responsibilities of the head of an institution in responding to a request under the *Act*, and introduces a solution to a problem that occurs in cases where it is unduly expensive for the institution to produce the record in order for the head to make a decision regarding disclosure.

Most people who have been involved with the Ontario *Act* are now familiar with the routine followed by institutions in deciding whether a record should be released. The steps go roughly as follows:

1. The Freedom of Information and Privacy Co-ordinator reviews the request and clarifies it with the requester if necessary.

2. The Co-ordinator contacts those employees within the institution who might be able to locate the relevant record, letting them know what the requester is looking for.

3. The Co-ordinator obtains the record and presents it to the appropriate decision-maker within the institution for consideration.

**NB As soon as the Co-ordinator becomes aware of the volume and/or location of the relevant records, he or she is in a position to decide whether the conditions for a time extension under subsection 27(1) of the* Act *are present; ie. the request is for a large number of records or necessitates a search through a large number of records and meeting the 30-day time limit would unreasonably interfere with the operations of the institution [subsection 27(1)(a)], or consultations that cannot reasonably be completed within the 30-day time limit are necessary to comply with the request [subsection 27(1)(b)].*

4. The decision-maker (i.e. the head, or the person delegated by the head) reviews the record and undertakes whatever consultations are necessary to determine if any exemptions in the *Act* apply. If any applicable exemptions are discretionary, the decision-maker decides whether discretion should be exercised in favour of releasing the record, or any part of the record, in the circumstances of the particular case.

**NB As soon as the contents of the record are known, the institution can decide whether it might contain third party information [subsection 17(1)] or certain personal information [subsection 21(1)(f)], and whether the provisions relating to affected persons under section 28 of the* Act *apply.*

5. The decision-maker decides whether or not to release the record, and issues a notice to the requester under section 26 of the *Act*. A fees estimate, if fees are to be charged, usually accompanies the section 26 notice.

Order No. 81 is the first time the Commissioner has addressed the contents of a section 26 notice that denies access. In his Order the Commissioner indicated that the notice must be detailed if the institution intends to deny access to a record, either in whole or in part. In interpreting the requirements for notice as outlined under subsection 29(1)(b) of the *Act*, the Commissioner found that the decision-maker should provide the requester with a general description of the records responding to the request (ie: words that generally describe the record without revealing the contents, such as "three memos" or "a 500-page report"). For each record withheld by the institution, the decision-maker should clearly identify the specific subsections of the *Act* being relied on, and indicate to which part of an individual record each exemption applies. These requirements apply to every decision in which a record is being denied, in whole or in part, except when the decision-maker is refusing to confirm or deny the existence of a requested record.

Order No. 81 also states that, if the institution has decided to charge fees, the requester should be made aware of the possibility of a fee waiver pursuant to section 57(3) at the time the section 26 notice is issued, and the requester should be asked for representations regarding the head's discretion to waive fees. By following this procedure, the decision-maker can exercise discretion on the question of fee waiver in the first instance, thereby avoiding an appeal on the fees issue right away.

Finally, Order No. 81 states that the issuance of a fees estimate has the effect of suspending the 30-day time limit imposed by section 26. It is reinstated on the day after the fees issue has been resolved, either by the requester paying a deposit, the head granting a waiver, or the question of fees being resolved on appeal by order of the Commissioner. Once reinstated, the institution must then give effect to its decision by producing the records it is willing to disclose within the balance of the 30-day period.

In addition to the general direction provided by the Commissioner in dealing with normal request situations, Order No. 81 also dealt with the particular situation where records that would respond to the request were large in volume and widely dispersed around the institution. In this appeal the institution estimated that to simply retrieve the records (step 2, described above), in order for the head to make a decision on disclosure would cost several thousand dollars. The Commissioner stated that in situations of this type, the *Act* allows the institution to provide the requester with a fees estimate, accompanied by an "interim" notice under section 26.

To arrive at the appropriate fees estimate, the decision-maker has two options: either to consult with employees of the institution who are familiar with the type and contents of the requested record; or to obtain and review a representative sample of the records and base the fees estimate on it. If, during the process of determining the fees estimate, the head decides that one or more exemptions in

the *Act* might apply, this information should be included as part of the "interim" section 26 notice. If no indication is made at the time a fees estimate is presented that an exemption may be claimed, the Commissioner found that it was reasonable for a requester to infer that the records would be released in their entirety upon payment of the required fees.

Order No. 81 clearly sets out the information that an "interim" section 26 notice should include a statement that a final decision respecting access has not yet been made, and the identification of possible exemptions, if applicable.

As with the usual section 26 notices, an "interim" notice should set out a reference to the fee waiver provision of subsection 57(3) of the *Act*, and solicit representations from the requester regarding the head's discretion to waive fees.

Because the "interim" section 26 notice does not reflect the institution's final position regarding the release of records, it is not appealable to the Commissioner. The fees estimate, on the other hand, can be appealed.

The issuance of a fees estimate in conjunction with an "interim" notice suspends the 30-day time limit under section 26, in the same way as a regular section 26 notice, as discussed earlier.

In the remaining time left after the fees issue has been resolved, the institution must retrieve and review all of the requested records for the purpose of determining whether access can be given. If the grounds for a time extension under section 27 exist, the appropriate notice can be issued, and, depending on the content of the record, the consultation procedure involving affected persons under section 28 might also be required. If the institution's final decision gives less than total disclosure, section 29 of the *Act* identifies the type of information which must be included in the notice.

To summarize, the steps that an institution would take in responding to a request where the relevant records are unduly expensive to produce in order to decide the question of disclosure are as follows:

1. If the Co-ordinator discovers that the records would be unduly expensive to retrieve, he or she either:

   a) arranges for a representative sample of the record to be produced for consideration by the appropriate decision-maker; or

   b) identifies an employee of the institution who can brief the decision-maker as to the nature, approximate volume and contents of the requested records.

2. The decision-maker issues an "interim" section 26 notice, indicating whether the decision outlined in the notice is based on consultation or a representative sample of the record. If fees are to be charged, a fees estimate accompanies the "interim" section 26 notice, together with an explanation of the waiver provision of the *Act*. If the institution contemplates the application of any exemptions, the decision-maker also advises the requester of this possibility. Once this fees estimate is sent, the 30-day time period for a response is suspended.

3. If a fees estimate is issued and the requester responds with an application for waiver, the decision-maker considers and decides whether waiver will be given.

4. The 30-day time period is reactivated upon receipt of a deposit, a decision to waive fees, or the issuance of an Order by the Commissioner. Subject to any time extensions under section 27 and/or special procedures relating to affected persons under section 28, the decision-maker then retrieves and reviews all records covered by the request and issues the final notice under section 26 within the balance of the thirty day period.

It is expected that the use of the special procedures relating to the issuance of "interim" section 26 notices will be limited, since most records are not unduly expensive to produce for consideration as to disclosure. However, when such situations do arise, following the procedures outlined above will be fair and reasonable to both requesters and institutions, and the procedures are consistent with the overall principles of the *Freedom of Information and Protection of Privacy Act*. As the Commissioner stated in his Order:

". . . they strike an appropriate balance between the "user pay" concept established by section 57, and the requester's right to have sufficient information on which to make an informed decision respecting payment of fees."

The procedures also help to eliminate problems that arise in situations where institutions are insufficiently familiar with the scope and content of the requested record before providing requesters with fees estimates and section 26 notices.

NEWSLETTER
ISSN 0840-5654

If you wish to be added to the mailing list for this publication or require additional information, contact:

Monica Zeller, Communications Officer
Information and Privacy Commissioner/Ontario
80 Bloor Street West, Suite 1700
Toronto, Ontario
M5S 2V1

Telephone: (416) 326-3333
Toll Free: 1-800-387-0073
Fax: (416) 965-2983

Cette publication est également disponible en français.